IN THE

Supreme Court of the United States

October Term, 1953

No. 223

DELTA AIR LINES, INC., *Petitioner*,

v.

ARTHUR E. SUMMERFIELD, Postmaster General of the United States, and THE UNITED STATES OF AMERICA, on behalf of the Postmaster General, *Respondents*.

On Writ of Certiorari To The United States Court of Appeals For the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

Certain of the statements and assumptions made in the Postmaster General's Brief[1] require corrective comment.

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[1] Herein the Brief for the Postmaster General will usually be referred to as "Res. Br."; the main Brief for Petitioner Delta as "Pet. Br."; the Brief for the Civil Aeronautics Board as "Board Br."; and the Brief for the *Amici Curiae* as "Amici Br."

A. The "In Excess of 'Need'" Argument.

The Postmaster General's first question reads:

> "Whether Section 406(b) of the Act empowers the Board to award subsidy in the form of 'need' mail pay which exceeds the carrier's actual 'need'" (Res. Br., p. 3).

This is a self-answering question. Obviously, the answer is "no". The error in the question is in its assumptions.

It assumes that the "fair and reasonable" rates fixed by the Board in 1948 for the domestic division of C&S[2] would cease to be "fair and reasonable" if operations while they were in effect resulted in a return of more than 7.4% on the investment allocated to the domestic division in any future period;[3] it assumes a finding of "need" by the Board limited to such a 7.4% return (Res. Br., p. 21; and see, Pet. Br., p. 52, n. 61); and it assumes that the Board thus established a floor geared to such a 7.4% return which would automatically give a legal status to all earnings from commercial and mail pay revenues above that floor as being outside and beyond the "need" of the domestic division and in excess of the "fair and reasonable" rates established therefor.

These assumptions are completely groundless. There is no basis for identifying any amount of the 1948-1950 domestic division earnings from commercial and mail pay revenues under final mail rates as having any legal status outside the fair and reasonable rates fixed in 1948 by the Board (Pet. Br., pp. 48-52).

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[2] There were 27 rates set forth in the Board's opinion which varied with differing load factors between the highest and the lowest rates established by the Board. *Chicago and Southern Air Lines, Inc., Mail Rates*, 9 C.A.B. 786, 826 (1948).

[3] The Board did not build any specific rate of return into the rates fixed. It expected the carrier's rate of return to vary not only with load factors experienced but also with economies resulting in lowered costs and higher earnings for the carrier (Pet. Br., pp. 7-8, including, particularly, n. 5, last paragraph).

The question further erroneously assumes that "actual 'need' " is a sharply limited, precise amount and that the Board's discretion in determining "need" is severely restricted.[4] There is no difference between "need" and "actual need". Furthermore, the Congress intended that the Board should have broad discretion in determining "need" in order to be able to achieve the important national objectives set forth in Section 406(b) (Pet. Br., pp. 55-58).

B. The Irrelevant Rate of Return Comment.

The Postmaster General's Brief states (Res. Br., pp. 15-16):

> "The fact is that the carrier here is complaining because its subsidy from the public treasury is limited to an amount which gives it an overall return after taxes of 7.3% on its invested capital... "

This statement leads the mind to believe that Delta is reaching for exorbitant subsidy payments from the Government yielding an abnormally high rate of return. This is not correct. The fact is that Delta is contesting the legal right of the Postmaster General, who, having failed to challenge for some three years the fair and reasonable final mail rates established in 1948 on C&S's domestic division, now asserts that the Board's action in setting such final rates on the domestic division in 1948 should be given no final significance and that C&S's mail pay should now be readjusted retroactively on a system basis. Furthermore, as noted in footnote 3 above, in the 1948 proceeding, the Board specifically recognized that varying rates of return would be achieved upon the domestic division depending upon cost economies and/or load factors attained.[5]

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[4] See also, Res. Br., p. 20.

[5] Indeed, as will be pointed out in further detail below, there is never a guarantee that a rate of return established in a proceeding setting a *future* mail rate will be achieved because it is impossible

The reasonableness of these rates of return, a matter for the Board's discretion and unchallenged by the Postmaster General, is not an issue in this proceeding.

C. The Postmaster General's View of Subsidy.

The extensive reference to amounts of subsidy provided under the Act during the past 18 years to air carriers (Res. Br., p. 14, n. 9) and to C&S in particular (Res. Br., p. 19, n. 16) is entirely diversionary and beclouds the question of the true Congressional intent as to the proper construction of Section 406(b) of the Act. If these references are designed to express a disagreement by the Postmaster General with the policy already established by Congress of empowering and directing the Board to provide subsidy in mail rates where necessary to enable air carriers to maintain and continue the development of air transportation in accordance with national objectives, these arguments should be addressed to Congress, not to this Court.[6]

D. The "Bounty" Concept.

The Postmaster General's Brief (p. 28) suggests that the Board's construction of the Act would allow it to go astray to make up losses on one of three hypothetical

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to forecast revenues and expenses with such a degree of exactitude. The result has been a considerable variation in rates of return. Thus the trunkline carriers average return on investment in domestic services has varied from 2.3% in 1938 (the year the Act was passed), to a high of 20.3% in 1942, to a net loss of $17,351,000 for the years 1946 through 1948, to 14.3% in 1952. The average for the entire 1938-1952 period was 8.3%. *General Passenger Fare Investigation*, Docket No. 5509, CAB Order No. E-7376, decided May 14, 1953, mimeographed opinion, Appendix A.

[6] It is Petitioner Delta's view, however, that the policy of Congress in supporting the air transportation during its infant days of development has borne fruit. All of the ten major trunk airlines in this country are now off subsidy in domestic operations (Pet. Br., pp. 38-39; and see, Board Br., p. 24) and receive only a mail rate designed to compensate them for carrying the mail. During 1952 these ten air carriers performed 97.8% of the total domestic revenue ton-miles performed by certificated trunkline air carriers (C.A.B. Recurrent Report of Mileage and Traffic Data).

domestic divisions of an air carrier even where the other two were extremely profitable. And he actually states:

> "... Under the Board's theory, all that would be required to justify such a bounty would be a reasonable basis for employing a separate proceeding for fixing subsidy for the unprofitable divisions." (Res. Br., p. 28).

The Board is in charge of classifying rate-making units. It has classified and re-classified rate-making divisions where public interest so required.[7] The implication that the Board would default in its public duty is insupportable. No such issue has been even remotely raised in this case.

E. The Repudiation of Traditional Rate-Making Argument.

The Postmaster General's Brief says that "... in any realistic sense, these are not rate proceedings at all ..." (Res. Br., p. 13).

As late as 1949 this Court in the strongly contested *TWA Case* held directly to the contrary.[8]

The Postmaster General's Brief attempts to distinguish the *TWA Case* by asserting that it "... held only that the Board has no power ... retroactively to revise a closed domestic *service* rate for the period prior to the filing of a petition to fix a new rate ... " (Res. Br., p. 13).

The attempted limitation of the holding of the *TWA Case* to a "service" mail rate as opposed to a "need" mail rate is not justified under Section 406 of the Act which makes no such distinction. Nor did this Court make such a distinction in the *TWA Case*. In fact, the language upon

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[7] Five air carriers which conduct both domestic and international or overseas operations are classified on a system-wide rather than a divisional basis for rate-making purposes (Board Br., p. 22, n. 9; and see, Amici Br., footnote on p. 18; and see, Pet. Br., pp. 22-23, and particularly n. 16).

[8] *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U.S. 601, 605, 606, 607 (1949). The office of the Solicitor General was on the Brief for the Civil Aeronautics Board in the *TWA Case* urging this Court to so hold.

which that case turned[9] occurs in Section 406(a) dealing with rates generally. Section 406(b) fits "need" rates directly into Section 406(a) when it says " . . . In determining the rate in each case, the [Board] shall take into consideration, among other factors . . . the need of each such air carrier . . . " (Pet. Br., Appendix).

F. The Guarantee Argument.

The Postmaster General's Brief (pp. 42-44) undertakes to minimize the point that the decision below jeopardizes the continuance in international operations of air carriers engaged in both domestic and substantial international services;[10] and in this effort he states:

> "The argument thus comes down to this: carriers are likely to give up a business in which, under the Board's current policy, the Government guarantees them ten percent after taxes . . . " (p. 44).

The Government does no such thing. In fixing mail rates for past periods in the international field, the Board allows 7% as it did here. For future periods it currently fixes final rates *estimated* to yield 10% in this field; but the carrier is not guaranteed anything under final future rates. It will almost never realize the estimates exactly. It may make more if it excels in efficiency or traffic, or both; or it may make less or even sustain a loss. There is no guarantee.[11]

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[9] That the Board is empowered and directed, after fixing and determining fair and reasonable rates, " . . . to make such rates effective from such date as it shall determine to be proper . . . " (Pet. Br., Appendix).

[10] See Board Br., pp. 20-30; Pet. Br., pp. 30-37; Brief of *Amici Curiae*, pp. 25-26.

[11] If the Act were administered so as to result in there being a guarantee, it would embody a cost-plus system of regulation which this Court has held "would not harmonize with the apparent design of the Act." *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U.S. 601, 606 (1949). In another case, in which certiorari was denied by this Court, the United States Court of

G. The Prior Practice of the Board.

The Postmaster General's Brief (p. 24) asserts that until the decision in the instant case the Board consistently has determined "need" for the carrier as a whole.

This is incorrect. In the Board's action in 1948 in fixing fair and reasonable rates for the domestic division of C&S it did not determine the "need" of C&S as a whole.[12] It has not done so in fixing the domestic division fair and reasonable mail rates for Braniff or Northwest or TWA. It has never done so in a case comparable to the instant case.[13] The Brief quotes a decision of the Board in which it stated that "The 'need' . . . is that of the air carrier as a whole and not that of any particular geographical division of its operations.", and it then states:

> " . . . This view was specifically reasserted in a number of subsequent cases involving subsidy mail pay for both domestic and international operations . . ." (Res. Br., p. 24).

It then cites numerous Board cases with the word "domestic" or "international" in parenthesis after the citation. None of the cases cited involve a carrier with domestic and international divisions separately classified for rate-making purposes.

The Postmaster General's Brief in relying again on the Board's practice in *Chicago and Southern Air Lines, Mail*

Appeals for the District of Columbia Circuit said: " . . . The Act, with its regulatory provisions, is not intended to underwrite profitable operations of a carrier's business, any more than statutes imposing regulation of public utilities are intended to insure them a net revenue. . . ." *Capital Airlines, Inc.* v. *Civil Aeronautics Board*, 171 F. 2nd 339, 340 (1948), cert. denied, 336 U.S. 961 (1949).

As to the validity of the far-reaching jeopardy claim affecting this nation's vital international air policy, see the Board on this point as quoted in Pet. Br., pp. 35-36; and see the references in n. 10 above.

[12] *Chicago and Southern Air Lines, Inc., Mail Rates*, 9 C.A.B. 786 (1948).

[13] See also, Pet. Br., pp. 46-48, including ns 45 and 46.

Rates for Routes Nos. 8 and 53, 3 C.A.B. 161 (1941) and *Pan American Airways, Alaska Mail Rates,* 6 C.A.B. 61 (1944) fails completely to meet the distinguishing characteristics of those cases as discussed in Petitioner Delta's Brief (pp. 43-46). In fact, it would be completely at variance with the Board's prior administrative practice to do what the Postmaster General here urges.[14]

H. The "No Inconsistency" Argument.

The Postmaster General's Brief states that:

> "There is no inconsistency in permitting the Board to conduct separate administrative proceedings to fix a carrier's domestic and international subsidy, and at the same time limiting total subsidy awarded in both proceedings to the need of the carrier as a whole. Cf. *B. & O. R. Co.* v. *United States,* 345 U.S. 146 . . ." (Res. Br., pp. 28-29).

He then cites the *Pan American Cases* which Petitioner Delta distinguishes in its main Brief.[15]

The only judicial authority which the Postmaster General has relied upon for the above-quoted proposition is *Baltimore & Ohio R. Co.* v. *United States,* 345 U.S. 146 (1953). The holding of the *B. & O. Case* was that as long as "rates as a whole afford railroads just compensation for their over-all services to the public the Due Process Clause should not be construed as a bar to the fixing of non-compensatory rates for carrying" certain categories of fresh vegetables "when the public interest is thereby served." The case is not in point. First, there was no question there of setting rates on the basis of a territorial unit less than the company-wide system with separate consideration of allocated costs and investments to each territorial unit. Separate consideration by territorial units has

[14] See discussions in Pet. Br., pp. 46-48.

[15] Pet. Br., p. 44-46.

been specifically declared lawful by this Court on numerous occasions.[16] Second, there was no question there of ascribing to a final and unchallenged rate in effect for three years a temporary quality as the Postmaster General here urges. This Court has specifically declared that a mail rate cannot be revised retroactively. *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board,* 336 U.S. 601 (1949).

CONCLUSION

The judgment of the court below should be reversed, and the orders of the Board for which review is sought, affirmed.

Respectfully submitted,

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[16] See Pet. Br., p. 25, citing *American Toll Bridge Co.* v. *Railroad Commission of California,* 307 U.S. 486 (1939) and *Wabash Valley Electric Co.* v. *Young,* 287 U.S. 488 (1933).